Editor's Note: Appeal filed, Civ. No. N-00-0435-HDM-VPC (D.Nev. 2000); Appeal filed, Case No. 00-553-C (Cl.Ct., Sept. 13, 2000).

UNITED STATES
v.
DIANA J. FOLEY ET AL.

IBLA 95-64 Decided January 16, 1998

Appeal from a decision by Administrative Law Judge Ramon M. Child finding no discovery of valuable mineral deposits of sandstone or limestone on the Stone of La Madra Claims #1 through #4 and A and B. NMC 564934; NMC 564935; NMC 564936; NMC 564937; NMC 564938; NMC 564939.

Affirmed as modified.

1. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Locatability of Mineral: Generally--Mining Claims: Specific Mineral(s) Involved: Limestone--Mining Claims: Specific Mineral(s) Involved: Sandstone

   During the period preceding the date Congress enacted section 3 of the Act of July 23, 1955, sandstone and limestone were locatable under the Mining Act of 1872. When Congress enacted the Common Varieties Act, it removed certain previously locatable minerals from the purview of the Mining Law of 1872 and made them subject to the provisions of the Materials Act of July 31, 1947. To determine if sandstone or limestone is locatable, one must look to the intrinsic qualities of the mineralization. To be locatable, the mineral material must have some intrinsic quality that differentiates it from ordinary deposits of sandstone or limestone. A showing that the deposits are of commercial value does not, in and of itself, make the sandstone or limestone contained in the deposits uncommon varieties. The sandstone or limestone contained in the deposits must hold unique properties which give them a competitive edge over other sandstones or limestones.

2. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

As against the United States, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may have been perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. A discovery has been made if mineral has been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Locatability of Mineral: Generally--Mining Claims: Withdrawn Land

When a withdrawal or similar event affecting the ability to locate a claim occurs, the existence of a discovery at the time of the event becomes critical to the validity of a mining claim. If the mining claim is perfected on the date the event transpires, certain rights have vested in the claimant, and those rights cannot be canceled by the action. On the other hand, if no discovery is made until after the event has transpired, the claim has not been perfected, no rights have been acquired, and nothing is lost by reason of the event.

4. Administrative Procedure: Adjudication--Mining Claims: Generally--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, it must establish a prima facie case. When the claimant has filed an answer asserting that the mineral material is of an uncommon variety, the Government's prima facie case may be made by a showing that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, that its value is comparable to similar mineral material sold for a common variety use, and that it has been unable to identify any use for the mineral material commanding a

higher price. Once the Government's case is presented, the claimant must present sufficient evidence to overcome the Government's case by a preponderance of the evidence, and if the mineral claimant fails to present sufficient evidence to preponderate, the Government will prevail, with the resulting finding that the mineral location is not supported by a discovery and is thus null and void.

5. Mining Claims: Locatability of Mineral: Generally--Rules of Practice: Government Contests--Rules of Practice: Hearings

The issue of "locatability" presented by the Common Varieties Act does not necessarily implicate the question of "discovery," and there is a major distinction between the evidence and case law applicable to each. The prudent man test is not applicable when considering whether the mineral deposit has a unique property giving it a distinct and special value. Comparing the value of mineral material on the claim to another commercial deposit has direct bearing on an uncommon variety determination, but little bearing on marketability.

6. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Locatability of Mineral: Generally

A common variety deposit does not possess a distinct, special economic value over and above the normal uses of the general run of such deposits. When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being put is a common variety use, the mineral material must carry some special economic value over and above the general run of such deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is in and of itself evidence that the mineral material is an uncommon variety. If the sales price for the material sold for a particular use far exceeds the average sales price, the price differential advances the argument that the mineral material has some property giving it distinct and special value.

APPEARANCES: Daniel T. Foley, Esq., Foley & Jones, Las Vegas, Nevada, for Appellants; Burton J. Stanley, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the United States.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Diana J. Foley, et al. 1/ (Appellants) appeal from a September 12, 1994, Decision by Administrative Law Judge (ALJ) Ramon M. Child following a contest initiated when the Bureau of Land Management (BLM) challenged the validity of six unpatented placer mining claims described as the Stone of La Madra #1 through #4, A and B, situated within secs. 8, 17, and 20, T. 20 S., R. 59 E., Mount Diablo Meridian, Clark County, Nevada.

In his Decision, Judge Child concluded:

> 3. Contestant established a prima facie case of the lack of a valid discovery of limestone deposits possessing a unique property or combination of properties giving the deposits a distinct and special value.
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> 4. Contestant established a prima facie case of the lack of a unique property or combination of properties giving the sandstone deposits a distinct and special value.
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> 5. Neither the proximity of the subject claims' limestone and sandstone deposits to the Las Vegas market, nor the accessibility of the deposits by road, nor the amount of overburden on the claims is an intrinsic characteristic of the deposits upon which a distinct and special value determination can be based.
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> 6. The color variation in the subject claims' sandstone deposits is a common attribute of building stones available in the Las Vegas area which does not qualify as a unique property upon which to base a determination of distinct and special value.
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> 7. Contestees failed to prove by a preponderance of the evidence the existence of a valid discovery of a limestone or sandstone deposit possessing a unique property or combination of properties giving the deposit a distinct and special value.

(Decision at 13-14.)

The Appellants seek to overturn the Decision of Judge Child which found that they failed to prove by a preponderance of the evidence that deposits of limestone and sandstone properties giving distinct and special value had been discovered prior to the withdrawal of the area from mineral entry.

1/ Appellants are Diana J. Foley, Daniel T. Foley, Patrick G. Foley, Helen A. Foley, Thomas Bodensteiner, Joseph M. Foley, Betty J. Foley, and James L. Hogan.

On May 5 and June 24, 1989, Appellants located the Stone of La Madra #1 through #4 placer mining claims 10 miles west northwest of Las Vegas, Nevada, in Clark County for sandstone, and on July 4, 1989, they located the Stone of La Madra placer mining claims A and B for chemical-grade limestone. (Tr. 41-42; Tr. 392-93.) Previously, on July 31, 1980, the land encompassed by the claims had been designated part of the La Madra Mountains Wilderness Study Area. (Ex. G-4, at 2.) On November 16, 1990, the land within the boundaries of the claims was withdrawn from mineral entry by the Red Rock Canyon National Conservation Area Establishment Act, Pub. L. No. 101-621. (Tr. 39-40.) The Las Vegas District Manager, BLM, thereafter determined that mining the six Stone of La Madra claims would be incompatible with the conservation of other resources specifically covered in the legislation establishing the Red Rock Canyon National Conservation Area. (Tr. 39-40.) A validity examination was then initiated to determine the validity of the subject mining claims.

The Appellants received notice of the pending validity examination by certified letter dated December 1, 1990, and were invited to attend the field portion of the validity examination. (Ex. G-4, at 2.) The field examination was conducted by BLM mineral examiners on January 23-25, 1991, and March 3-7, 1991. (Tr. 42-43.) With respect to the limestone deposits, the BLM mineral examiners found:

> The claimants have not demonstrated that chemical grade limestone exists in sufficient quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. They have also not established nor attempted to establish a market, either for chemical or metallurgical grade limestone or limestone suitable for the production of cement, for the limestone present on the subject claims, now nor at the time of withdrawal.
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> Investment in development of limestone for chemical or metallurgical purposes or for the production of cement on the subject claims would be extremely risky and uncertain. A prospecting target has been pinpointed. At most, additional exploration may be justified. No discovery, as it relates to either chemical grade limestone, metallurgical grade limestone or limestone of a grade suitable for the production of cement, has been made.

(Ex. G-4, at 22.)

In evaluating the sandstone within the six claims, the BLM mineral examiners determined: "[W]e did not find a unique property that gives the Stone of La Madra sandstone a distinct and special value that is reflected in reduced costs of production. The Stone of La Madra deposits are similar in value to known common variety deposits." (Ex. G-4, at 40.)

After evaluating both the limestone and sandstone deposits, the BLM examiners recommended:

> Contest should be initiated against the Stone of La Madra #1 (NMC 564934), Stone of La Madra #2 (NMC 564935), Stone of La Madra #3 (NMC 564936), Stone of La Madra #4 (NMC 564937), Stone of La Madra A (NMC 564938), and Stone of La Madra B (NMC 564939) charging that:
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> > -Locatable minerals have not been found within the limits of the claims in sufficient quantities and/or qualities to constitute a discovery of a valuable mineral deposit.
> >
> > -The mineral material found within the limits of the claims is not a valuable mineral deposit under Section 3 of the Act of July 23, 1955, (69 Stat. 367; 30 U.S.C. 601).

Id.

The contest thereafter initiated by the Las Vegas District Manager, BLM, resulted in the ALJ Decision, part of which is quoted above. In their appeal to this Board, Appellants claim that the Government could not establish a prima facie case regarding the sandstone claims because the Government's "expert witnesses" had no expertise and lacked qualifications to testify about the marketability of the sandstone. (Appellants' Brief at 6-9.) Second, Appellants urge that the ALJ not only allowed the Government geologists to testify as experts, he "arbitrarily and capriciously characterized their extremely weak evidence as being credible, persuasive and significant." (Appellants' Brief at 9.) Further, Appellants assert that the ALJ ignored the wealth of creditable evidence presented to prove the validity of the sandstone claims. (Appellants' Brief at 12-13.) Finally, Appellants claim that the Government itself proved the validity of the their limestone claims by a preponderance of the evidence and that the ALJ arbitrarily and capriciously ruled to the contrary. (Appellants' Brief at 14-17.)

In its Answer, Respondent asserts that while Appellants attack the BLM mineral examiners because they claim they were unqualified to testify on the issue of marketability, that issue was not reached in this case. (Respondent's Answer at 2.) Respondent urges that Appellants must show they have a discovery of locatable mineral before marketability becomes relevant. Respondent asserts that Appellants have not demonstrated a discovery of limestone, even though the surface exposures show that the quality of limestone at depth might be of chemical grade, because they failed to test sufficiently to determine either the quality of the deposit at depth or its extent. (Respondent's Answer at 2.) Likewise, Respondent claims Appellants have failed to demonstrate that the sandstone located on the claims possessed any unique quality giving it special value, i.e., no

one would pay more for it. (Respondent's Answer at 2.) Respondent argues that Appellants had to demonstrate that the sandstone on the claims was locatable, before the issue of marketability became relevant, and they failed to do so. (Respondent's Answer at 2.) Respondent explains:

> BLM Mineral Examiner Burch conducted a market survey and investigation to determine whether the sandstone on the claims was common variety. His survey determined that the stone could be sold, but not at a price higher than competing building stone. He made no attempt to determine whether either the limestone or the sandstone could be marketed at a profit because, in his opinion, Appellants had not made a discovery of a valuable deposit which would warrant such an examination. His market survey entailed displaying of samples of the sandstone to distribution yards in Arizona, Nevada, and Southern California. Mr. Burch was not required to market the stone; his duty was to ascertain whether the sandstone on the claims had any unique quality that would bring a higher price or lower mining costs. Burch was certainly well qualified to make this determination. He described, in detail, his efforts to determine whether the sandstone from the claims was "common variety" material.

(Respondent's Answer at 2-3.)

[1] Appellants located the claims in this case for building stone, the Stone of La Madra #1 through #4 for sandstone and the Stone of La Madra A and B for limestone. (Tr. 388-94.) Both minerals were locatable under the Mining Law of 1872 prior to Congressional enactment of section 3 of the Common Varieties Act of July 23, 1955, 30 U.S.C. § 611 (1994). 2/ When the Common Varieties Act was enacted, Congress removed certain previously locatable minerals from the purview of the Mining Law of 1872 and rendered them subject to the Materials Act of July 31, 1947, 30 U.S.C. § 601 (1994).

The Common Varieties Act states:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders * * * shall be deemed a valuable mineral deposit within the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, that nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this

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2/ This Act will hereinafter be referred to as the Common Varieties Act.

> subchapter and sections 601 and 603 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

30 U.S.C. § 611 (1994).

A common variety mineral is further defined at 43 C.F.R. § 3711.1. The provisions of 30 U.S.C. § 611 (1994) are restated in paragraph (a) of that regulation. Paragraph (b) further provides, in pertinent part:

> (b) "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industrial practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material.

43 C.F.R. § 3711.1(b).

A limestone or sandstone deposit which has some property or aggregate of properties giving it distinct and special value is locatable under the Mining Law of 1872. See United States v. Multiple Use, Inc., 120 IBLA 63, 77 (1991). To determine whether the sandstone or limestone deposit is locatable, the intrinsic qualities of the mineralization, as well as the economic value, must be examined. The regulations thus provide that "[m]ineral materials which occur commonly shall not be deemed to be 'common varieties' if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation." 43 C.F.R. § 3711.1(b). The test is always whether the mineral has some intrinsic quality that differentiates it from other ordinary deposits. Importantly, however, a showing that the deposit is of commercial value does not necessarily give the mineral material within the deposit the character of "uncommon variety." United States v. Multiple Use, Inc., supra; see also United States v. U.S. Minerals Development Corp., 75 Interior Dec. 127, 134 (1968). For this reason, the limestone and sandstone deposits at issue in this case must hold those unique properties giving it distinct and special value, and thus a competitive edge

over general run limestone and sandstone. See United States v. Multiple Use, Inc., supra; United States v. Thomas, 1 IBLA 209, 217, 78 Interior Dec. 5, 11 (1971).

With regard to the limestone in Stone of La Madra A and B, a showing that it is of chemical grade could make it locatable. The applicable regulation, 43 C.F.R. § 3711.1(b) provides, inter alia, that "[l]imestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not 'common varieties.'" With respect to chemical grade, this Department held in United States v. Chas. Pfizer & Co., 76 Interior Dec. 331, 342-43 (1969), that "limestone containing 95 percent or more calcium and magnesium carbonates is an uncommon variety of limestone which remains subject to location under the mining laws."

Similarly, with respect to the sandstone deposits in La Madra #1 through #4, there must be a determination that it is of an uncommon variety for it to be locatable. There must be a comparison of the deposit with other deposits of similar materials in order to ascertain whether the deposit has a property giving it a distinct and special value. United States v. Chartrand, 11 IBLA 194, 201 (1973). If the sandstone is to be used for the same purposes as other materials of common occurrence, then it must possess some property which gives the deposit a distinct and special economic value for such uses, which value is generally reflected by the fact that it commands a higher price in the market place. United States v. Multiple Use, Inc., supra, at 78; United States v. Chartrand, supra, at 202; United States v. California Soylaid Products, 5 IBLA 179 (1972); see also United States v. Thomas, supra, at 217.

[2] Once it is determined that a deposit is locatable under the Mining Law of 1872 when it meets the standards described above, we must examine the requirements for making and maintaining a discovery capable of supporting a mining claim. As against the United States, a mining claimant acquires no vested rights by staking a mining claim. Even though a claim may have been perfected in all other respects, unless and until a claimant is able to show that a claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. United States v. Multiple Use, Inc., supra, at 79; see also United States v. Coleman, 390 U.S. 599 (1968).

In Castle v. Womble, 19 Interior Dec. 455 (1894), this Department established the standard for determining whether there has been a discovery—the "prudent man" test. Although established more than 100 years ago, this test remains the accepted standard for this determination. A discovery has been made if "minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Id. at 457.

The "marketability test" cited by Appellants in their argument, (Appellants' Brief at 6-9), is merely a means of ascertaining whether there will be a "valuable mine" and is not a supplemental or complementary standard. United States v. Multiple Use, Inc., supra, at 80. The requirement of showing that the evidence is of such a character that there is a reasonable prospect that the commercial value of the deposit exceeds the cost of extracting, processing, transporting, and marketing the contained minerals remains valid. Id.

When establishing the potential sales price of the sandstone and limestone, Appellants here needed only to demonstrate a potential market for the product at a price marking it as special and distinct. Actual sales were not required. See United States v. Foresyth, 100 IBLA 185, 239, 94 Interior Dec. 453, 483 (1987). Evidence of market potential is customarily given through the testimony of a person having specific or general knowledge of the existing market. See, e.g., id.; United States v. Whittaker, 95 IBLA 271, 286 (1987). That person may have knowledge of market conditions as a seller or as a buyer of that product or as an independent observer. See United States v. Shiny Rock Mining Corp., 112 IBLA 326, 352-353 (1990).

Where the sale of either sandstone or limestone in the available markets might be considered a sale of common variety mineral, that fact must be considered when determining whether there is a discovery of a locatable deposit. The uncommon (locatable) mineral must support the mining operation, and the sale of common variety minerals may not be considered when forecasting profitability. See United States v. Foresyth, 100 IBLA at 240-48, 94 Interior Dec. at 484-88.

[3] When, as in this case, the land upon which the claims are located is withdrawn from mineral entry, the existence of a discovery prior to the withdrawal becomes critical to a validity determination. If the mining claim was perfected on the date of the withdrawal, certain rights have vested in the claimant, and those rights cannot be cancelled by the withdrawal. Conversely, if there was no discovery until after the withdrawal, the claim was not perfected on that date and no rights were acquired. See United States v. Multiple Use, supra, at 81; United States v. Wichner, 35 IBLA 240 (1978).

[4, 5] The distinction between the issues of discovery and location is critical when, as here, the parties are litigating whether a mining claim is invalid because it was located for one or more of the minerals named in the Common Varieties Act. If the mineral deposit is valuable because it has some unique property giving it distinct and special value, it is not a common variety and may be located.

Thus, when the Government has presented a prima facie case that the mineral is a common variety and not subject to location, the Appellants must demonstrate by a preponderance of the evidence that the deposit has some unique property giving it distinct and special value in order to

establish that it is subject to location. Similarly, the Government has the responsibility to establish a prima facie case when a Government-initiated contest involves a question of the existence of a discovery. It may do so by presenting evidence that the value of the mineralization fails to satisfy the prudent man test in one or more respects. If the claimant does not present sufficient evidence to preponderate, the Government will prevail, with a resulting finding that the mineral location is not supported by a discovery and is null and void. See, e.g., United States v. Parker, 82 IBLA 344, 353, 91 Interior Dec. 271, 276 (1984), and cases cited therein.

[6] As previously noted, a common variety deposit does not possess a distinct, special economic value over and above the normal uses of the general run of such deposits. See 43 C.F.R. § 3711.1(b). When the preponderance of the evidence supports the conclusion that the use to which the mineral material is being put is a common variety use, the mineral material must carry some distinct, special economic value over and above the general run of such deposits when applied to that use. If, on the other hand, the mineral material commands a premium over that sold for common variety uses, that fact is, in and of itself, evidence that the mineral material is an uncommon variety. If the sales price for the material sold for a particular use far exceeds the average sales price for such use, the price differential advances the argument that the mineral material has some property giving it distinct and special value. See United States v. Multiple Use, Inc., supra, at 101-02.

The Court of Appeals for the Ninth Circuit established standards for distinguishing between common and uncommon varieties in McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969). 3/ In McClarty, an arm's-length purchaser's willingness to pay more than the "common variety price" for a particular mineral strongly supported a finding that the deposit was intrinsically unique. Id. at 908-09.

We turn to the limestone and sandstone deposits, respectively. Where, as here, the land occupied by the six mining claims has been withdrawn from operation of the mining laws, the validity of the claims must be tested by the value of the mineral deposit as of the date of the withdrawal (1990),

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3/ In McClarty, the court set out principles to determine uncommon variety, as follows: (1) the stone in question is compared with other deposits of such minerals generally; (2) the mineral deposit in question must have some unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for other uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

as well as the date of the hearing (1994). See United States v. Garner, 30 IBLA 42, 66 (1977). If, at the time the land was withdrawn from operation of the mining laws, the claims were not supported by discovery of valuable mineral deposits, the land within the boundaries of the claims would not be excepted from the effects of the withdrawal, and such claims could not thereafter become valid even though the value of their mineral deposits increased due to a change in the market or because of the finding of additional mineral. Id.

As noted earlier, discovery of a mineral deposit sufficient to support a valid mining claim requires the deposit be of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his time and means with the reasonable prospect of success in developing a valuable mine. United States v. Foresyth, 100 IBLA at 208, 94 Interior Dec. at 453, and cases there cited. Even though a claim may have been perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the bounds of the claim, no rights are acquired. United States v. Coleman, 390 U.S. 599 (1968); United States v. Multiple Use, Inc., supra, at 79.

To determine whether Respondent presented a prima facie case of a lack of a discovery of a chemical limestone deposit prior to the date of withdrawal of the land from mineral entry in 1990, we look to the testimony of Alvin Burch and Jeffrie Garrett, BLM's mineral examiners, and the mineral report prepared by BLM. See Ex. G-4. From the BLM mineral examiners' testimony and review of the mineral report, we are convinced that there is insufficient evidence to show the quality and quantity of limestone at a depth sufficient to support a discovery.

Garrett testified that when he examined the claims, there was no evidence of mining or exploration of limestone. (Tr. 186.) Further, Garrett's testimony established that there was no exposure of the limestone at a depth to determine mineral consistency, (Tr. 189), and, in his expert opinion, there was no exposure of limestone on the claims sufficient, either in quality or quantity, to support the discovery of a valuable mineral deposit. (Tr. 189.)

We further determine that the evidence presented by Appellants in response to the prima facie case of Respondent before Judge Child was insufficient to preponderate on the issue of lack of discovery of a valuable mineral deposit of limestone. The principal evidence presented by Appellants concerning the discovery of an uncommon chemical-grade limestone deposit prior to withdrawal was the testimony of Joe Foley, one of the Appellants, that he had taken a mining engineer, Richard Hatch, to the claims in 1989. The hearsay testimony from Foley that Hatch had opined, without conducting any chemical analysis or fully examining the claims, that "industrial limestone" was present, constituted the sole evidence of uncommon limestone being determined prior to 1990. (Tr. 389-92.) Hatch did not testify and no chemical analysis was conducted by Hatch or any

other person prior to withdrawal as a result of this examination. The only other testimony of significance concerning the limestone deposit presented by Appellants was adduced from John Gladden Cleary, a geologist. He testified that although he had not tested the limestone, he had reviewed the tests of channel samples taken by BLM from the surface, after withdrawal, and could reasonably predict that the high quality would be consistent along strike and down dip of that limestone bed. (Tr. 336.)

Despite testimony from Appellants' witness concerning the inference to be drawn from samples taken by BLM after withdrawal, BLM witness Garrett's expert testimony that there was insufficient evidence of discovery of uncommon variety limestone prior to withdrawal, or after withdrawal, based upon the samples taken and other available evidence, warrants a determination that Judge Child's Decision is supported by a preponderance of the evidence. See United States Fish and Wildlife Service, 72 IBLA 218, 220 (1983). 4/

With respect to the sandstone deposits, Respondent established a prima facie case that they were not subject to location through the testimony of Burch that the deposits lacked a unique property or combination of properties giving them a distinct and special value. Burch explained in his testimony that after viewing other deposits of building stone and after investigating the market for building stone, he found that the sandstone deposits on the La Madra claims do not have a unique intrinsic property. Respondent's witness correctly noted that the proximity to markets does not constitute an intrinsic characteristic of the deposits upon which a distinct and special value determination could be based. See United States v. Henri (On Judicial Remand), 104 IBLA 93, 98-99 (1988). Burch also pointed out that the sandstone located on the claims was not homogeneous. (Tr. 65-67, 75-76, 166.)

4/ One argument, not raised, would have likely precluded a finding that a valid discovery of chemical-grade limestone was made on the Stone of La Madra A and B. When Appellants located the Stone of La Madra A and B chemical-grade limestone claims on July 4, 1989, they did so as building stone placer claims. See Tr. 41-42; Tr. 392-93. In U.S. v. Haskins, 59 IBLA 1, 49 (1981), the Board stated that if the limestone is chiefly valuable because of chemical or metallurgical properties, the proper mode of location is dependent upon the nature of the deposition. In Haskins, supra, at 44, we noted that "[a] placer discovery will not sustain a lode location nor a lode discovery a placer location" (quoting Cole v. Ralph, 252 U.S. 286, 295 (1920)). Thus, assuming the limestone on the claims is in lode form, the claims, in so far as they purport to be located for chemical-grade limestone, were not properly located as building stone placers. Because this issue was not raised in the contest, however, it may not be relied on by the Board to dispose of the claims. See United States v. Miller, 138 IBLA 246, 278, n.18 (1997); United States v. McElwaine, 26 IBLA 20 (1976).

The evidence adduced from Mineral Examiner Burch's investigation reflects that the stone from the claims neither serves a use which other sandstones from other deposits cannot serve, nor can it be mined at a lower cost than other competitive building stones. The testimony of Burch also reflected that the coloration of the La Madra stone was not significant when compared with other Aztec sandstone available in the Las Vegas area. We specifically concur in the ALJ's finding that the stone possesses neither unique characteristics nor use for applications beyond that which other like common building materials could be put.

In their effort to preponderate on this issue, we find Appellants have not met their burden. We concur with Judge Child that the Appellants have neither shown that the sandstone serves a use which other building stones cannot serve nor that the sandstone would command a price higher than that of other building stone. (Decision at 9.) Eight witnesses testified on this issue for Appellants, but only Patrick Foley and Bert Ward specifically addressed the relative price at which La Madra sandstone might be sold. Ward's testimony was ambivalent. He first stated: "[I]t's hard to say yes or no, would I pay more." (Tr. 385.) He then stated that he would because of the proximity of the stone to the Las Vegas market. (Tr. 385.) Price affected by proximity, however, can never be used to evaluate the intrinsic quality of mineral in an uncommon variety determination. United States v. Henri, supra, at 98-99.

Ward also testified that the range of color in the La Madra sandstone would likely cause him to pay more for this stone, because he would not have to deal with more than one seller of different color stones. (Tr. 386.) Judge Child properly found in his Decision, however, that this Department has repeatedly held that variation in color is a common attribute of building stones which does not qualify as a unique property upon which to base a determination of distinct and special value. See 1 Am. L. of Mining § 8.01[4][b][ii] (2nd ed. 1984) (citing numerous decisions of the Department). More importantly, the mineral report prepared by BLM for the La Madra claims, (Ex. G-4), notes that several area deposits of sandstone possess this characteristic color variation. In any event, with respect to the claims individually, Appellants have never presented evidence concerning which of the alleged unique characteristics exist on each.

Although Patrick Foley testified that the La Madra sandstone would sell for a higher price and thus should be considered an uncommon variety, his opinion was not supported by any specific offers or anything beyond general expressions of interest he had received from builders. (Tr. 252-73.)

Finally, Appellants' attempt to preponderate by offering testimony that the accessibility of the deposit and the lack of overburden would allow for low-cost mining, and thus support a determination as an uncommon deposit. (Tr. 265-66, 319-21.) As we stated in United States v. Multiple Use, supra, at 94, however, the amount of overburden is not an intrinsic quality of the stone being mined, and thus is of "no consequence" in determining whether a deposit is common or uncommon. Similarly, the fact that

the La Madra claims are easily accessible to existing roads is an extrinsic factor which bears on economic viability of the deposit, but is not a unique property which gives the deposit a distinct and special value. See United States v. Henri, supra, at 98-99.

In reviewing the Appellants' challenge to the qualifications of Mineral Examiner Burch, we are unpersuaded. In delineating his experience as a supervisory geologist, we concur with Judge Child that Burch has been established as an experienced professional who has been heavily involved in the development of training courses for validity examination, economic evaluation, and appraisal of mining claims. (Decision at 7; Tr. 96-97.)

While not specifically included in their briefs to this Board, at the hearing, Appellants raised the issue of whether they should be afforded the further opportunity to sample the claims and conduct a market analysis. Respondent's counsel Stanley specifically offered Appellants that opportunity at Tr. 8-9:

> I tell you right now, Your Honor, that, in my opinion, the Bureau was in error in suspending that plan and not allowing the plan to proceed. * * * At this point in time, the Bureau is prepared to allow the Contestees to go out and, according to their second plan of operations, are prepared to lift that suspension and approve the plan of operations as we speak.
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> * * * * * * *
>
> I'm very concerned that this be placed on the record and that a decision be made finally and completely that binds the Contestees on this issue for it absolutely would serve no purpose to go forward with this contest and then have this issue raised on appeal at a higher level and have the matter be remanded back to go over the same material.

On behalf of Respondent, Stanley then stated that if Appellants accepted the offer, the Government would stipulate to a continuance of the hearing in order to let them proceed under their plan. (Tr. 9.) When Judge Child asked Appellants' counsel: "As far as you're concerned, the market study opportunity provided by BLM is meaningless to the Contestees and you wish to go forward?" Appellants' counsel responded: "That's correct, Your Honor." (Tr. 26.)

In his Decision, instead of relying upon the waiver executed by Appellants on the record above, Judge Child found that Appellants, by failing within the time prescribed to appeal to this Board the BLM Decisions denying and then suspending Appellants' plans of operations, as they were advised in writing they could do, were precluded by the doctrine of administrative finality from raising any issues related to denial or suspension of those plans. (Decision at 11.) We find that equity dictates otherwise. Given the statements of Stanley above that BLM was in error in failing to allow Appellants' plans to go forward, we find that Appellants were not bound by their failure to appeal the plans of operations Decisions.

However, by not accepting BLM's offer at the hearing and choosing to go forward with the hearing in this case, we find Appellants waived any objection to their inability to undertake operations pursuant to their plan. The Decision is thus modified accordingly.

We are similarly troubled by Judge Child's lack of precision in his use of the terms "location" and "discovery" in Conclusions of Law #3 and #4 of his Decision. (Decision at 13.) A mineral deposit is locatable as an uncommon variety under the mining law if it has some intrinsic quality that differentiates it from ordinary deposits of the same mineral, such that this unique property gives it a competitive edge over general run deposits of the mineral. United States v. Multiple Use, Inc., supra, at 77. A discovery has been made if "minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, supra, at 457. In the case of the sandstone deposits on the claims, since there is no locatable mineral deposit, there can be no discovery. With respect to the limestone deposits on Stone of La Madra A and B, we are satisfied that the quantity and quality of the mineral was not established such that a person of ordinary prudence would be justified in the further expenditure of his labor and means to develop a mine. To the extent the Conclusions of Law at page 13 of the Decision do not clearly reflect the distinction between the terms, as set forth above, they are so modified.

In the present case, Appellants have not met their burden in overcoming the Government's case by a preponderance of the evidence either with respect to (1) establishing discovery of the limestone deposit, because insufficient evidence was presented with respect to the calcium carbonate content throughout the deposit and the size of the deposit was not shown to be sufficiently large that it would be economical to mine, or (2) with respect to establishing discovery of an uncommon sandstone deposit, because Appellants failed to preponderate with respect to the issue of a unique property giving a distinct and special value which could command a price which exceeded that paid for other local multi-colored sandstone.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed as modified.

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James P. Terry
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge